



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL CASE NO. 40 OF 2017

HEZEKIAH W GICHOBHI

ISAAC M KIRAGU

JONAH KARIUKI all practicing as H.W Gichohi Certified Public Accountants.....APPELLANTS

VERSUS

TRAVEL CREATIONS LIMITED.....RESPONDENT

Being an appeal from the judgment (M. Chesang)(Mrs) in Civil Case Number 835 of 2013

delivered on 6th May, 2016 at Nairobi Chief Magistrates Court

JUDGEMENT

Background:

1. The genesis of the instant appeal is the Respondents plaint dated 31st January, 2013 suing the appellants for the sum of Kshs. 889,183/= being the consolidated loss occasioned by the appellants professional negligence. The Appellants in response to the Respondents suit filed their statement of defence and counterclaim seeking the sum of Kshs. 1,431,411/= being amount owing for the services rendered to the Respondents. Both parties called two witnesses during the trial.
2. It was the Respondent case that the Appellants were their auditors and also their tax agents and that in the course of their contractual relationship, the appellants acted negligently occasioning them loses. The dispute arose in the year 2011 when Kenya Revenue Authority demanded the payment of the sum of Kshs. 2,860,525/= being tax arrears from the Respondents.
3. Consequently, the Respondent sought the services of another accounting firm by the name Labchey and Associates to undertake reconciliation and sort out their tax issues. Upon reconciliation, they allege that it was found that they owed KRA the sum of Kshs. 638,817/= as tax arrears, which they paid and subsequently filed the civil Case Number 835 of 2013 claiming damages against the Appellants for the penalties and interests that they accumulated as a result of their alleged negligence or lack of professionalism.
4. In response to the Respondents allegations, the appellants alleged that indeed they were contracted by the Respondent as their auditors and that they were to offer the following services being to assist in setting up books of account, compile financial reports every quarterly and to carry out interim audit every year.
5. In respect to the assignment of advising the Respondent on tax returns and reconciliation with KRA and applying for compliance certificate, they allege that this was a separate work which they were contracted annually when need arise, analogous to a retainer in an Advocate client relationship and that the same was chargeable separately. . However, they allege that by the time their appointment was terminated, they had not billed the Respondents for all the services rendered.
6. They denied committing a tort of negligence as alleged by the Respondents. It was their position as brought out by PW2 the Respondent witness that indeed the tax system in place allowed a set off payment and in this case it was clear after reconciliation undertaken with KRA on the alleged tax owing that KRA was owed by the Respondents the sum of Kshs. 638,817/= whereas the Respondents had made tax overpayment of Kshs. 626,219/= which on set off shows that the Respondents were not in the arrears alleged by the Kenya Revenue Authority(KRA), asserting that they were not negligent in advising the Respondent regarding their tax issues.
7. Further, they alleged that the Respondent terminated their employment so as to give a job to the Directors friend PW2 as their auditor,

who happens to have been his colleague for many years when they both worked at Appolo Insurance, and that the suit against them was fraudulent and extortionist.

8. The Honourable Magistrate after trial dismissed the suit holding that the issues raised were subject to the Accountants Disciplinary Committee as contemplated under Section 28 of the Accountants Act, classifying the same as a Professional Misconduct, hence finding that the court lacked Jurisdiction to determine both the Respondent claim and the appellants counterclaim.

9. Aggrieved by the said decision rendered on 28th May, 2014, the appellant appealed to this honorable Court citing thirteen grounds of appeal in their memorandum of appeal filed on 9th February 2017 which are as follows:-

- 1) *The Learned trial magistrate misapprehended the case before the court, namely, the nature of the cause of action relied on by the Respondent and also the one relied on by the plaintiff in their Counterclaim.*
- 2) *The learned magistrate ignored the appellants written submissions.*
- 3) *The learned magistrate erred in holding that she lacked jurisdiction to try the suit before the court.*
- 4) *The learned magistrate erred in not holding that the court had jurisdiction to entertain a claim based on alleged negligence and a counterclaim based on a breach of contract by the Respondent taking the form of a retainer of an accountant by a client.*
- 5) *The judgment delivered is against the weight of evidence and the submissions on record.*
- 6) *The learned magistrate erred in ignoring the evidence of PW1 in which she admitted that the appellants were not negligent and the termination of the appellant's appointment was because of the desire of change on the part of the Respondent.*
- 7) *The learned magistrate erred in not finding as a fact that the appellants were not negligent and dismissing the suit with costs to the Respondents on that ground.*
- 8) *The learned magistrate erred in not dismissing the Respondents claim which was extortionate and fraudulent.*
- 9) *The learned magistrate erred in not holding that the counterclaim was based on a breach of contract taking the form of the retainer of an accountant by the plaintiff.*
- 10) *The learned magistrate erred in holding that the relevant provisions applicable were under the Accountants Act; cap 531 Laws of Kenya, and not under the law of contract.*
- 11) *The learned magistrate erred in law in holding that the proceedings before her were best canvassed before the Disciplinary Committee as provided for by Section 28 of the Accountants Act.*
- 12) *The learned Magistrate erred in law in holding that the Counterclaim was founded on the wrong provisions of the law.*
- 13) *The learned magistrate erred in dismissing the defence and counterclaim.*

Submissions:

10. Both parties agreed to dispose of the appeal vide written submissions, and they both filed their written submissions in respect to the instant appeal. The appellant submissions were filed on 30th July, 2019, whereas the Respondents submissions were filed on 14th August, 2019.

Appellants Submissions:

11. Through their written submissions, the appellants combined and addressed the following grounds of appeal. The first issue addressed by the appellants is Ground 1, 3, 4,9,10 and 11 of their Memorandum of Appeal: The jurisdiction of the Subordinate Court to hear the appellants Counterclaim. In this regard they submitted that the lower court erred in finding that it did not have the jurisdiction to determine the issues raised by the parties at the lower court including their counterclaim. They argued that the court erred in finding that the matters raised ought to have been addressed by the Disciplinary Committee pursuant to section 28 of the Accountants Act, submitting that the proceedings in such respect are different and the prayers sought unique and does not include issues raised herein. They relied in the case of **Joseph Wambugu Kimenju vs Attorney General (2013) eKLR**.

12. In addition, they argued that the sum of Kshs. 1,431,411/= was within the pecuniary jurisdiction of the magistrates court and therefore the lower court had the jurisdiction to deal with the matter.

13. Further, they submitted that their relationship with the respondents is analogous to the retainer of an advocate by a client, arguing that the Respondents claim for negligence was based on the presumption that the KRA demand for tax payment and penalties were true. In this regard they rely in the case **Kinluck Holding Ltd vs Mint Holdings Ltd and Another, Court of Appeal at Nairobi, Civil Appeal No. 264 of 1997**.

14. Furthermore, they submitted that when a dispute arises between a client and a professional, they can either sue in contract or in tort or combine both as was held in *Patrick S.K Kimiti vs John Nguji Gachau and Another (2015) eKLR*, arguing that the court erred in finding that it did not have the jurisdiction.

15. The second issue addressed by the Appellants is ground 2,5,6,7 and 8; on whether the appellants were professionally negligent in handling the Respondents books of accountants. In this regard they submitted that they performed their duties as per their contract between them and the respondent which ran from the year 1995 to November, 2010 when it was terminated. They submitted that the alleged amount which was allegedly owed to KRA by the Respondents was subject to a set off as provided for under section 39 and 79 of the Income Tax Act cap 470 Laws of Kenya and therefore the allegations that they were negligent is baseless.

16. They submitted that the respondents never discharged the burden of proof to the required standard proving that they were negligent in discharging their professional duties. In this they relied in the cases of *Jenifer Nyambura Kamau vs Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010 (2013) eKLR* and *Nabro Properties Ltd vs Sky Structures Ltd (2002) 2KLR 299*.

17. The third issue addressed by the Appellant is grounds 8, 9, 10, 12 and 13 of appeal, being the Appellants claim for payment of services rendered but not paid for. They submitted that their counterclaim is valid as there is no provision under the law that fees ought to be raised as soon as the work is done. They submitted that until 22nd November, 2010 when their contract was terminated by the Respondents their retainer as auditors was in place, and that their claim for outstanding fees was within the limitation of action Act and therefore the same is valid. They added that the Respondents benefited from the services rendered and therefore ought to pay the same under the Quantum merit rule as explained in the case of *Stephen Kinini Wangondu vs the Ark Limited (2016) eKLR*.

18. The final issue addressed by the appellant is on the costs of this appeal. In this regard they urged the court to exercise its discretion and award them costs. In this regard they relied in among others the supreme Court decision of *Jasbir Singh Rai and 3 Others vs Tarlochan Singh Rai and 4 Others(2014) eKLR*.

Respondents Submissions:

19. The Respondents in their submissions addressed the grounds of appeal in the appellants Memorandum of appeal. The first issue addressed by the Respondent is grounds 3,4 and 10 on whether the lower court had the jurisdiction to deal with the issues in the suit, and in this regard they submitted that they agree with the Appellants that indeed the court has the jurisdiction to deal with issues raised herein and that the court finding that the same ought to be dealt with Accountants Disciplinary Committee as provided for under Section 28 of the Accountants Act was erroneous.

20. On ground 1 and 2 of the appellants Memorandum of appeal which is to the effect that the lower court ignored the appellants submissions and misapprehended the case before the court, they submitted that the same is erroneous and scandalous and meant to paint the lower court in negative light arguing that the lower court actually recorded the defence evidence and analyzed them clearly in the judgment.

21. In respect to ground 5 and 6 of the appellant memorandum of appeal that the judgment is against the weight of evidence and submission on record, the Respondents differed with the appellants arguing that the only fundamental mistake made by the magistrate was in respect to the court jurisdiction.

22. In regard to grounds 7 and 8 where the appellants allege that the trial magistrate erred in failing to dismiss the Respondent claim with costs for failing to prove their negligence allegations, they submitted that indeed they proved their negligence allegations against the appellants, arguing that the appellants failed to exercise reasonable skills and care as expected of auditors and tax agents causing them to incur tax overpayment due to their failure to diligently undertake tax their reconciliations.

23. In sum the respondent urged the court to find that they proved their claim for negligence to the required standards and that the appellants failed to prove their counterclaim and dismiss the same with costs. In the alternative, they urged the court to remit the matter before another magistrate for trial.

Issues and Analysis:

24. This being a first appeal and guided by the provisions of Section 78 of the Civil Procedure Act, this court ought to reevaluate and reexamine the lower court record and the evidence before it and arrive at its own independent conclusion, having regard to the fact that it neither saw nor heard the witnesses as they testified, as was stated in *Sielle vs Associated Motor Boat Company Ltd [1968] EA 123* by Sir Clement De Lestang that:

“This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

25. Additionally, in *Mbogo vs Shah & Another [1968] EA 93*, the court set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:

“I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it was failed to take into consideration matters which it should have

taken into account and consideration and in doing so arrived at a wrong conclusion.”

26. I have considered the parties pleadings herein, the appellants and respondents submissions and the entire record of appeal, and in my view the following are the issues that arise for determination:-

- a) Whether the lower court has the Jurisdiction to deal with the issue raised or the same are subject to the Disciplinary Committee under the Accountants Act.
- b) Whether the appellants was professionally negligent
- c) Is the Defendant entitled to the reliefs sought in the counter- claim?

a) Whether the lower court has the Jurisdiction to deal with the issue raised or the same are subject to the Disciplinary Committee under the Accountants Act:

27. I have looked at the Accountant Act with a view of establishing its Jurisdiction visa vis the finding of the lower that it did not have the jurisdiction to adjudicate on the matters raised herein. It is apparent that the Disciplinary Committee as established under section 31 of the **Accountants Act** has the power to inquire and adjudicate over complaints of professional misconduct as prescribed under section 32 of the Act. It focuses on conduct that is deemed to amount to professional misconduct, which is comprehensively set out in section 30 of the Act. It is worth noting that all the circumstances relate to actions of the members as a professional practicing accountant.

28. It is therefore conclusive that the disciplinary provisions as provided for in the Accountants Act only apply in instances where the conduct complained of relates to a member of the Accountancy Professions in their trade or in their role as an accountant. The Lower Court was of the view that the Disciplinary Committee by virtue of sections 30 and 32 of the Accountants Act has authority to deal with the issues raised herein.

29. It was submitted by both parties herein that the matters or issues raised herein are within the jurisdiction of the court and not within the exclusive jurisdiction of the Disciplinary Committee above. I agree with both the appellants and the Respondent that the court has the jurisdiction to adjudicate on the issues raised by the parties herein, and therefore it is my finding that the lower court erred in this regard. A party can sue a professional in a court of law to recover damages and losses incurred as a result of negligence, as is the case in the members of the legal profession.

b) Whether the cause of action for negligence against the appellant was merited:

30. As regards an action in negligence it is stated in **Halsbury's Laws Of England, 4th Edition** at paragraph 662 at page 476 as follows with respect to the what is required to be proved in an action for negligence that-

“The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established.”

31. The applicable law in cases involving an alleged infringement of a professional duty of care is set out in **Charlesworth & Percy on Negligence, 9th Edition, London, Sweet & Maxwell (1997)** at page 535 under paragraph 8-01 which states that;

“Where special skill is required for a task a reasonable man would not be expected to attempt it, unless he is possessed the skill in question. In the event that he undertakes the work, he is bound to exercise the skill and competence of an ordinarily competent practitioner in that calling.”

32. In **Bolam vs Friern Hospital Management Committee [1957]1WLR 582** at page 586 **McNair J.** held that;

“Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill... A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular act.”

33. In the present case, the Respondents alleged that the appellants during the subsistence of their contract acted negligently and in unprofessional manner occasioning them loses in terms of penalties as a result of outstanding taxes which were unpaid to the Kenya Revenue Authority.

34. The genesis of the dispute herein is the KRA demand for Kshs. 2,860,525/= vide a letter dated 25th January, 2011 for outstanding taxes. Upon reconciliation the amount was reviewed downwards to Kshs. 638,817/=. However, on further review it was found out that the Respondent had in fact made an overpayment of Kshs. 626,219/= which would be subjected to a set off as per the existing KRA policy. This is what emerged from the trial and the examination of the parties' witnesses.

35. Based on the above it is apparent that there was no outstanding taxes as alleged by the Respondent to warrant or validate the claim for

negligence against the appellants. Their claim as argued by the appellants was based on the truth of the alleged outstanding tax arrears claimed by the KRA and since reconciliation was undertaken and the alleged arrears demystified to a negligible sum, the respondent claim therefore fails, and I do find so.

c) The Defendant entitled to the reliefs sought in the counter- claim?

36. The appellant through his counterclaim is claiming the sum of Kshs. 1,431,411/- as outstanding bill for services rendered. The lower court failed to determine this issue on merit just like the other issues raised herein.

37. The question therefore is as to whether the appellant tendered sufficient evidence to prove his counterclaim for the alleged sum of Kshs. 1,431,411/=. The appellant claim is for an outstanding bill which they allege stood unbilled prior to the termination of their contractual engagement with the Respondents. The Respondent has denied the same.

38. It is apparent to this court that the appellant counterclaim herein seems an afterthought as it was made after the respondent sued them for Professional negligence. The appellants should have billed the Respondents immediately after their contractual relationship was terminated in November, 2010, where at least evidence of such fee notes would suffice as evidence of outstanding fees.

39. In the result I find that the appellants counterclaim is unsubstantiated and therefore dismiss them same with no orders as to costs.

Conclusion:

40. In conclusion the appeal succeeds to the foregoing extent and I therefore allow the same with no orders as to costs of the appeal and the lower court being awarded to any of the parties.

FINAL ORDER:

- 1) The lower court had jurisdiction to entertain the claim.***
- 2) The suit and the counter claim are dismissed.***
- 3) Parties to bear their costs.***

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2019.

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C. KARIUKI

JUDGE